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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

October Term, 1988

WILLIAM M. HATTEN, *Petitioner*

vs.

JACK M. RAINS, Secretary of State for the State of Texas, *Respondent;*

LARRY VESELKA, Chairman, Harris County Democratic Party, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is Court of Appeals barred from considering Petitioner's First Amendment ballot access claim because of this Court's summary affirmance of Diamond v. Cuomo, _____ U.S. _____, 108 S.Ct. 2008 (1988) and Maresca v. Cuomo, 474 U.S. 802 (1985)?

2. Was Petitioner's First Amendment right of access to the ballot denied because of a Texas Constitutional provision that, in effect, prohibits a person over 75 years of age from seeking public elective office as a state district judge?

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QUESTIONS PRESENTED

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2. Was Petitioner's First Amendment right of access to the ballot denied because of a Texas Constitutional provision that, in effect, prohibits a person over 75 years of age from seeking public elective office as a state district judge?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, the Honorable William M. Hatten, former Judge of the 176th District Court of Harris County, Texas; Jack M. Rains, Texas Secretary of State, the state's chief election officer, respondent, and Larry Veselka, Chairman of the Harris County Democratic Party. The various parties, who intervened as public supporters of Judge Hatten, are not parties to this appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM M. HATTEN, *Petitioner*

vs.

JACK M. RAINS, Texas Secretary of State, *Respondent*,
and

LARRY VESELKA, Chairman Harris County
Democratic Party, *Respondent*

The Petitioner, William M. Hatten respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 25, 1988.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 854 F.2d 687 (5th Circ. 1988), and is reprinted in the appendix, p. 1a, infra. The opinion of the District Court is not reported but is reprinted in the appendix.

JURISDICTION

Petitioner originally brought this suit in Texas State District Court for Harris County, Texas seeking to invalidate Art. V, Sec. 1-a of the Texas Constitution because it violated his First Amendment right of access to the ballot and to enjoin the enforcement of that Texas Consitutional

provision against him. The respondent, Rains, was originally sued as the state's chief election officer; respondent, Veselka, intervened as the Harris County official who would have to enforce the Consitutional provision. The Texas District Court Judge, the Honorable Alice Oliver Trevathan, granted petitioner's request for a preliminary injunction.

Respondent, Rains, then removed this action to United States District Court for the Southern District of Texas. Various supporters of petitioner then intervened claiming that, because of the state consitutional bar, they were deprived of the opportunity of voting for the judicial candidate of their choice. The District Court denied petitioner relief. See Appendix.

The Court of Appeals affirmed that dismissal on August 25, 1988. See p. 1a. No petition for rehearing was sought.

Jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

Art. V., Sec. 1-a, Texas Constitution, reeads in relevant part.

> .... The office of every such [state] judge and justice shall become vacant when the incumbent reaches the age of seventy five (75) years....

STATEMENT OF THE CASE

Petitioner was, until August 24, 1988, the elected judge of the 176th District Court of Harris County, Texas and had been so for twenty years. His term of office was to expire on December 31, 1988. Desiring to run for reelection, petitioner sought to enjoin enforcement of Art. V, Sec. 1-a of the Texas Constitution in the fall of 1987. Petitioner was

required to file his application to be placed on the Democratic Party's ballot by January 4, 1988, for the term commencing January 1, 1989, and interpreted Art. V, Sec. 1-a as a bar to his candidacy.

Following removal to District Court, respondent Veselka urged the District Court to hold with Petitioner, but would, absent contrary instructions from the Court, be forced to deny petitioner's application to be placed on the Democratic Party's ballot because of the operation of Art. V, Sec. 1-a.

Following the dismissal of his case by the District Court, Petitioner, in fact, sought to file as a candidate for the 176th District Court of Harris County. Respondent Veselka, because of the operation of Art. V, Sec. 1-a, denied petitioner's application to be placed on the ballot. Art. V, Sec. 1-a, thus, denied petitioner the right to seek reelection.

The basis of petitioner's challenge to Art. V, Sec. 1-a was that it denied him the opportunity to seek election to the office of state District Judge. Because he would have reached 75 years of age before the effective commencement date of the term of office, he was barred from seeking that office. Petitioner never sought to invalidate the Texas Constitutional provision merely to complete his term of office.

The Court of Appeals rejected petitioner's claim for two reasons. The first concerned the effect of this Court's summary affirmance of two cases: *Diamond v. Cuomo,* 70 N.Y.2d 338, (1987), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988) and *Maresca v. Cuomo,* 64 N.Y.S.2d 724 (1984) appeal dismissed, 474 U.S. 802 (1985). The Court of Appeals held that these decisions foreclosed consideration of petitioner's claim even if the theory raised in the instant case

was not raised in the earlier cases. 854 F.2d at 690, fn. 3.

The Court of Appeals then correctly rejected the argument that age was a suspect criteria.

As to petitioner's claim that Art. V, Sec. 1-a infringed upon a fundamental First Amendment right of access to the ballot, the Court of Appeals split. Judge Goldberg held that petitioner's legal argument was correct; Art. V., Sec. 1-a operated as a complete bar to his candidacy. But for this Court's summary affirmance in *Diamond* and *Maresca*, Judge Goldberg would have granted relief. 854 F.2d at 695-96. Judge Garwood, with whom Judge Jolly joined, concurred, wrote that any age requirement is necessarily arbitrary and "will inevitably exclude some number of those who are more qualified than some who are not so excluded. . . . " 854 F.2d at 696. Such requirements are reasonable because they enhance the officeholder's abilities rather than deprive a segment of the population of representation. Id.

REASONS FOR GRANTING THE WRIT

A.

As to the first issue, the Court of Appeals was not barred from considering petitioner's claim because of this Court's summary affirmance of *Diamond v. Cuomo*, 70 N.Y.2d 338, (1987), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988) and *Maresca v. Cuomo*, 64 N.Y.S.2d 724 (1984) appeal dismissed, 474 U.S. 802 (1985). This Court has held that "the precedential effect of a summary affirmance can extend no farther that "the precise issues presented and necessarily decided by those actions." *Illinois State Board of Elections v. Socialist Workers*, 440 U.S. 173, 182 (1979) quoting from *Mandel v. Bradley*, 432 U.S. 173 (1977). No more can be read into this Court's action in *Diamond* and *Maresca* than was

necessary to sustain those judgments. 440 U.S. at 183.

The plaintiff in *Diamond*, an elected New York judge, contended that the Equal Protection Clause of the Fourteenth Amendment was violated because of the Age Discrimination in Employment Act's extension of protection to appointed public official but not elected officials. See 29 U.S.C. Sec. 630 (f). *Maresca* urged an equal protection reversal. The New York courts disagreed.

It has never been petitioner's contention that the Equal Protection Clause was violated simply because he was forced to retire at age 75. Petitioner has always argued that Art. V, Sec. 1-a either violated his First Amendment right of access to the ballot or, alternatively, the exclusion of those over 75 violated the Equal Protection Clause because the exclusion impinged upon the fundamental right of access to the ballot. Thus, the effect of the summary dismissal in *Diamond* and *Maresca* was irrelevant to this cause. See *Hicks v. Miranda,* 422 U.S. 332, 343 (1975).

B.

As to the second question, the decision of the Court of Appeals, at least as to the opinion of the two concurring judges, clearly conflicts with this Court's treatment of ballot access cases. Sup.Ct. 17.1(c). Judges Garwood and Jolly insisted on applying the same equal protection principles applied to mandatory retirement cases. See e.g. *Massachussetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976); *Vance v. Bradley,* 440 U.S. 93 (1979). "Age is not a suspect or quasi-suspect classification, and in my view is not comparable to race or gender or economic status." *Hatten v. Rains,* 854 F.2d at 696, concurring opinion, J. Garwood.

The controlling analysis is that set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983):

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to evaluate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. (citations omitted).

Even though the impact of a ballot access restriction implicates the First Amendment freedoms of the voters rendering it "especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," 103 S.Ct. at 1572, that does not limit the scope of the inquiry.

> Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'103 S.Ct. at 1572

It is clear, as was emphasized in the Court of Appeals, that the success of a ballot access case depends on the extent to which a candidate can prove exclusion from the ballot. If the effect or exclusion is de minimis, as in *Clements v. Fashing,* 457 U.S. 957 (1982), a more traditional equal protection analysis is appropriate; if the restriction operates to completely bar a candidate's access to the ballot, it must survive a stricter scrutiny. In the case at bar, petitioner is completely denied the opportunity to put his qualifications to the voting public for approval.

Because the Court of Appeals rejected petitioner's claim based, in part, on an erroneous interpretation of this Court's summary affirmances in *Diamond v. Cuomo,* 70 N.Y.2d 338, (1987), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988) and *Maresca v. Cuomo,* 64 N.Y.S.2d 724 (1984) appeal dismissed, 474 U.S. 802 (1985) and, in part, upon an incorrect application of traditional equal protection analysis, in conflict with this Court's precedent, certiorari should be granted.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael B. Charlton, a member of the Bar of this Court, hereby certify that on November 22, 1988, three copies of the Petition for Writ of Certiorari in this action were mailed to Lou Bright, Assistant Attorney General for the State of Texas, P.O. Box 12548, Capital Station, Austin, Texas 78711.

MICHAEL B. CHARLTON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-6302

WILLIAM M. HATTEN

Plaintiff-Appellant,

versus

JACK M. RAINS,

Secretary of State for the State of Texas, ET AL.,

Defendant-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(August 25, 1988)

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

GOLDBERG, Circuit Judge:

I write today, at 82 years of age, with a heavy pen and an even heavier heart. The Honorable Judge William Hatten has served his district ably for over 20 years. His ample competence is stipulated by all parties. Yet today we are compelled by precedent to inform Judge Hatten that he may not be a candidate for reelection, simply because, tomorrow, he will celebrate his seventy-fifth birthday.

Judge Hatten challenges Art. V, §1-A of the Texas Constitution ("Art. V, §1-A"), which requires all Texas judges to retire at the age of 75. This appeal raises two issues under the Equal Protection Clause of the Fourteenth Amendment: first, whether a mandatory retirement age for judges, standing alone, constitutes invidious discrimination; and, second, whether mandatory judicial retirement, by barring Appellant from the ballot, violates the fundamental first amendment right to associate of Judge Hatten and his supporters.

I sincerely wish that our birthday message could be a happier one. However, the people of Texas have chosen youth over wisdom, and we are not free to meddle with their choice:[1] the district court heard unrebutted evidence that

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[1] The framers of the United States Constitution made the opposite choice. Article III grants federal judges life tenure. This choice has certain costs, but it also has its benefits. Many noted judges have served ably, well into their eighties and nineties and made crucial contributions to our jurisprudence. Chief Justice Marshall served until the age of 80 and wrote at least 96 opinions after the age of 75, including such important opinions as *Barron v. Mayor and City of Baltimore,* 32 U.S. 243 (1833). Oliver Wendell Holmes served on the court until he was 91 years of age, writing at least 471 opinions after the age of 75, including many dissents which have shaped the course of modern law. These opinions include *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 513, 532 (1928) (Holmes, J., dissenting); *Beech-Nut Packaging Co. v. Lorillard Co.*, 273 U.S. 629 (1927); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Gitlow v. New York, Taxicab Co.*, 276 U.S. 513, 532 (1928) (Holmes, J., dissenting);

judicial ability declines with age; and, more importantly, the Supreme Court has spoken twice, though summarily, in cases with virtually identical facts.[2]

Though there is some merit to Judge Hatten's argument that Art. V, §1-A violates fundamental first amendment rights, our hands are tied by the Supreme Court.[3] Perhaps unfolding years will open eyes that are now closed. Until then

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Beech-Nut Packaging Co. v. Lorillard Co., 273 U.S. 629 (1927); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Gitlow v. New York*, 268 U.S. 652, 672 (Holmes, J., dissenting); *Adkins v. Children's Hospital*, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting); *Smith v. Kansas City Title & Trust*, 255 U.S. 180, 213 (1921) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Frohwerk v. United States*, 249 U.S. 204 (1919) ; *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting). Similarly, Louis Dembitz Brandeis served ably until his 83rd year, writing at least 113 opinions after reaching the age of 75. These opinions include *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932); *Crowell v. Benson*, 285 U.S. 22, 65 (1932) (Brandeis, J., dissenting). It is impossible to quantify the benefits to the nation of those additional years. Our case law is immeasurably richer because of the opinions cited above.

[2] In *Diamond v. Cuomo*, 70 N.Y.2d 338, 514 N.E.2d 1356 (1987), *appeal dismissed*, 108 S.Ct. 2008 (1988), and *Maresca v. Cuomo*, 64 N.Y.2d 242, 475 N.E.2d 95 (1984), *appeal dismissed*, 474 U.S. 802 (1985), the Supreme Court examined New York laws requiring retirement of elected judges at the age of 70. Both times the New York Court of Appeals upheld the law, and both times the Supreme Court dismissed the appeals for lack of a substantial federal question.

[3] Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), (quoting, *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959)). We are therefore bound, even if a theory not raised in the earlier case would lead to a different result. See *Bowers v. Hardwick*, 760 F.2d 1202, 1213 (llth Cir. 1985) (Kravitch, J., concurring in part, dissenting in part), rev'd, 106 S.Ct. 2841 (1986) .

we are bound by precedent to affirm.

I. Facts

William Hatten is currently the elected judge of the 176th Judicial District of Harris County, Texas. He has held this post for the last twenty years. On August 26, 1988, Judge Hatten will turn 75. His term of office expires December 31, 1988. Under Art. V, §1-A of the Texas Constitution, when a sitting judge turns 75, his seat becomes automatically vacant. Thereafter, judges over the age of 75 are entitled to sit as visiting or temporary judges at the discretion of the administrative judge of a state judicial district.

Because Judge Hatten will be over 75 before the beginning of his next term, he is ineligible to be placed on the ballot. Larry Veselka, Chairman of the Harris County Democratic Party, refused Judge Hatten's nominating petitions. Judge Hatten brought this suit challenging the constitutionality of Art. V §1- A, and seeking access to the ballot.[4] Mr. Veselka then joined the lawsuit on behalf of the

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[4] Although the Democratic primary was held on March 8, 1988, this lawsuit is not moot for three reasons. First, Judge Hatten retains an interest in the litigation generally, because he remains permanently barred from future judicial elections in Texas. Second, even if Judge Hatten did not intend to seek judicial office in the future, this lawsuit is not moot with respect to this election. The law is clear in this circuit that an unconsitutional election is void. If unconstitutional state action deprives a candidate of ballot access, or if unconstitutional state action deprives the election itself of its validity, federal courts have authority to invalidate the election and to hold a new election. *Bell v. Southwell,* 376 F.2d 659 (5th Cir. 1967); *Hamer v. Camubell,* 358 F.2d 215 (5th Cir.),*cert. denied,* 385 U.S. 851 (1966). Finally, the Supreme Court has heard a number of election cases after the general election, even when there was no chance of retrospective relief, because the cases were capable of repetition yet evasive of review. *American Party of Texas v. White,* 415 U.S. 767, 770 n.1 (1974); *Storer v. Brown,* 415 U.S. 724, 737 n.8 (1974). See *Morial v. Judiciary Com. of Louisiana,* 565 F.2d 295, 297 n.3 (5th Cir. 1977) (en banc), *cert. denied,* 435 U.S. 1013 (1978).

Harris County Democratic Party, as did several of Judge Hatten's supporters, claiming violation of their first amendment rights.

The district court held that Art. V, SS1-A is constitutional. Judge Hatten appeals.

II. Discussion

The equal protection clause of the fourteenth amendment guards against invidious discrimination. The clause invalidates classifications enacted with the intent to disadvantage a particular group, or which operate to deprive a class of people of their fundamental rights. Intent to discriminate is rarely evident on the face of a statute. The Supreme Court therefore examines the means-ends fit between a classification and its proferred legislative goal. The underlying insight is that the the tighter the fit, the less likely the proferred justification is to be a pretext for intentional discrimination. The Supreme Court has used a multi-tiered, some would say sliding scale, analysis. Classifications which impermissibly interfere with the exercise of a fundamental right or operate[] to the peculiar disadvantage of a suspect class are subjected to strict judicial scrutiny, and must constitute the least restrictive means to achieve a compelling state interest. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 (1976); *San Antonio School District v. Rodriguez,* 411 U.S. 1, 16 (1973). Classifications which operate to the peculiar disadvantage of a quasi-suspect class are accorded intermediate scrutiny, and must bear a significant relationship to an important state end. *See, e.g., Kirchberg v. Feenstra,* 450 U.S. 455 (1981). All other classifications need only bear a rational relationship to a legitimate legislative end. See, *e.g., City of Cleburne v. Cleburne Livina Center,* 473 U.S. 432 (1985).

To determine the constitutionality of Art. 5, §1-A, we

must first determine the level of scrutiny accorded classifications based on age, and whether the proffered justifications for that classification achieve the required means-end fit. We must then determine whether excluding Judge Hatten from the ballot burdens the fundamental rights of Judge Hatten or his supporters. We deal with these questions in order.

A. Scrutinizing Classifications Based on Age

1. Rational Basis Review

In *Massachusetts Board of Retirement v. Murgia,* 427 U.S. at 307, the Supreme Court determined that classifications based on age alone are entitled to only rational basis review. The Court examined a Massachusetts statute that required uniformed state police officers to retire at the age of fifty.[5]

First, the Court addressed whether the elderly are a suspect class. As the Court put it, to be treated as a suspect class a group must have been saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 427 U.S. at 313 (quoting Rodriguez, 411 U.S. at 28). Applying this standard, the Court noted, first, that while the treatment of the aged in the

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[5] A three judge court held that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest, *id.* at 316 (quoting *Massachusetts Board of Retirement v. Murgia,* 376 F. Supp. 753, 754 (D. Mass. 1974). That court conceded that there was a relationship between age and the ability to perform the strenuous tasks which are required of a policeman. Without deciding precisely what level of scrutiny was required, the court held that because Massachusetts already engaged in rigorous physical evaluation of police officers over the age of forty, a per se retirement rule served no rational purpose.

United States has not been wholly free of discrimination, the aged have not been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities, *Murgia*, 427 U.S. at 313, and second, that old age does not define a 'discrete and insular' group, *United States v. Carolene Products Co.*, 304 U.S. 144f 152-52 n.4 (1938), in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span. *Murgia*, 427 U.S. at 313-314. The Court therefore deemed age to be a non-suspect classification, subject only to rational basis review.

Applying rational basis review to the statute, the Muraia Court noted that the state may legitimately seek to protect the public by assuring physical preparedness of its uniformed police, *Murgia*, 427 U.S. at 314, and conceded that physical ability generally declines with age. The statute withstood rational basis review, even without any scientific evidence that any particular level of deterioration began at age fifty.[6]

The Supreme Court amplified the teachings of *Murgia*

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[6] Justice Marshall in dissent conceded that the aged are not a suspect class in the same way as Blacks. However, he argued that the strict two tier analysis followed by the Court was inadequate for dealing with the broad variety of classifications faced by modern legislatures. The strict two tier analysis used by the Court divided all classifications between those subject to strict scrutiny, which would always fail, and those subject to rational basis review, which would always survive. Justice Marshall argued, as he has frequently, and with force, for a sliding scale that would increase the level of scrutiny applied to a classification if it disadvantages a group in an area where they have been traditionally subjected to discrimination. Noting that employment is an area in which the elderly have been particularly subjected to discrimination, Justice Marshall argued for elevated, though not strict scrutiny. Applying this level of scrutiny to the case, Marshall conceded that the law served a legitimate state end --

in *Vance v. Bradley*, 440 U.S. 93 (1979), where it considered the constitutionality of a maximum retirement age of 60 for foreign service officers. The Court reiterated that the aged, as a group, were not entitled to special judicial protection, and emphasized just how minimal that protection was:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

440 U.S. at 98. Applying this standard, the Supreme Court concluded that the mandatory provision served the legitimate goals of maintaining a vigorous service and creating promotion opportunities for younger officers.

2. Rational Basis Review of Mandatory Judicial Retirement

A number of federal and state courts have reviewed legislation setting mandatory judicial retirement ages. They have been unanimous in their conclusion that the Constitution allows states to require both elected and

guaranteeing the physical fitness of law enforcement officials -- but argued that the particular age chosen by the Massachusetts legislature was arbitrary. Fifty, he argued, was lower than any other mandatory retirement age in any other police force in the country. As such, he would have held the mandatory retirement age unconstitutional.

appointed judges to retire on or after their seventieth birthday. *Malmed v. Thornburgh*, 621 F.2d 565 (3rd Cir.), *cert. denied,* 449 U.S. 955 (1980) (Pennsylvania constitutional provisions requiring retirement of judges at 70 upheld as rational); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (Illinois statutory provision requiring retirement of elected judges at 70 upheld as rational); *Rubino v. Ghezzi,* 512 F.2d 431 (2d Cir.), *cert. denied* 423 U.S. 891 (1975) (New York Statute requiring retirement of elected judges at 70 upheld).

Most recently, New York has passed on the same issue twice, both times upholding mandatory judicial retirement of elected judges at 70. Both times the Supreme Court has dismissed the appeals for want of a substantial federal question. *Diamond V. Cuomo,* 70 N.Y.2d 338, 514 N.E.2d 1356 (1987), *appeal dismissed*, 108 S.Ct. 2008 (1988); *Maresca v. Cuomo,* 64 N.Y.2d 242, 485 N.E.2d 95 (1984), *appeal dismissed*, 474 U.S. 802 (1985). As we noted above, such dismissals are on the merits, and binding on lower courts. *Hicks v. Miranda,* 422 U.S. 332 (1975).[7]

Art. V, §1-A has no reported legislative history. A contemporary article in the *Texas Bar Journal* points out that the goal of the amendment was to insure that judges retire when they should. W.S.J. Garwood, *InvoluntarY Retirement*

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[7] Though the equal protection clause of the fourteenth amendment provides little protection from discrimination on the basis of age, the elderly are not without some protection against the evils of prejudice. In 1967, Congress enacted the Age Discrimination Employment Act (ADEA), Pub.L.No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)). The ADEA renders it unlawful for employers to discriminate against persons over forty on the basis of age. 29 U.S.C. §§ 623(a), 631. *Thornbrough v. Columbus and Greenville R.R.*, 760 F.2d 633 (5th Cir. 1985). The ADEA does not apply to elected state officials. 29 U.S.C. SS 630(f).

and Removal of Appellate and District Judges, [1964) Texas B.J. 947, 949. The article notes that the constitutional amendment conforms with the A.B.A. Model Plan for Judicial Disability and Retirement. *Id.* at 1007.

In *Malmed,* 621 F.2d at 573, the Third Circuit examined this question. They noted that mandatory judicial retirement conformed with the A.B.A. recommendation and fleshed out the goal of insuring that a judge retire when he should, arguing: (1) that mandatory retirement would create a pool of part-time judges; (2) that mandatory retirement eliminates the unpleasantness of selectively removing aged and disabled judges; and (3) that the harm done by a few disabled judges more than offsets the loss of judges who retain full powers.

These proferred rationales constitute a sufficient basis for a legislative enactment reviewed for mere rationality. We must therefore conclude that a mandatory retirement age of 75 does not, by itself, violate the equal protection clause.

B. Fundamental Rights?

Recognizing that age is not a suspect classification, and that there is a rational reason for requiring mandatory judicial retirement, Judge Hatten makes a second equal protection argument. Because he is ineligible for office, he has been refused access to the ballot. He argues that this ballot access restriction violates the fundamental first amendment right of political association. As we have noted, classifications which impermissibly infringe fundamental rights are invalid under the equal protection clause. *Murgia,* 427 U.S. at 312. Judge Hatten's argument therefore has substantial force. However, as we have noted, a summary dismissal by the Supreme Court of an appeal as of right is a dismissal on the merits, and we are bound by the Supreme Court's decisions in *Diamond* and *Maresca.* But for

these decisions, it might be necessary to decide otherwise.

1. Whose Right to What?

There is no fundamental right to be a candidate. Far from recognizing candidacy as a 'fundamental right,' the Supreme Court has held that the existence of barriers to a candidate's access to the ballot'does not itself compel close scrutiny.' *Clements v. Fashing,* 457 U.S. 957, 963 (1982) (quoting *Bullock v. Carter,* 405 U.S. 134, 143 (1972)). Limitations on ballot access nonetheless burden two fundamental rights: the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasions to cast their votes effectively. *Munro v. Socialist Workers Party,* _____ U.S. _____, _____, 107 S.Ct. 533, 536 (1986) (quoting *Williams v. Rhodes,* 393 U.S. 23, 30 (1968)). In examining ballot access restrictions, the Court has focused on the rights of particular classes of voters to elect a candidate of their choice. The ballot access cases focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity. Id. at 540 (quoting *Lubin v. Panish,* 415 U.S. 709, 716 (1974)).[8]

2. What Level of Scrutiny?

The Supreme Court has never stated the level of scrutiny applicable to ballot access restrictions with crystal

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[8] Judge Hatten has standing to raise this issue. He has stated that he is his own preferred candidate and would vote for himself if allowed to run. In addition, several of Judge Hatten's supporters have intervened in this lawsuit as parties plaintiff.

clarity.[9] The rigid multi-tiered approaches outlined above are too rigid for dealing with ballot access cases. There is no question that the rights to vote and to associate are fundamental. There is also no question that some regulation of access to the ballot is necessary in order to conduct orderly elections, and that the states have some authority to establish qualifications for office. As Justice stevens recognized, any election regulation inevitably effects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

The Supreme Court has taken several different approaches to resolving this conundrum. Justices Brennan and Marshall would apply strict scrutiny to, and invalidate, any restriction which burdens the right to vote. *See, e.g.. Munro,* 107 S.Ct. at 540 (Marshall, J. , dissenting); *Williams v. Rhodes.* Justice White's views have evolved. At first he recognized that strict scrutiny applies, but found a compelling state interest in orderly elections and therefore in a comprehensible ballot. *Storer v. Brown,* 415 U.S. 724 (1974); *American Party of Texas v. White,* 415 U.S. 767 (1974). More recently he has departed from this approach in favor of a more ad hoc approach that fails to mention strict

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[9]The cases got off to a rocky start. In *Williams v. Rhodes,* 393 U.S. 23 (1968) the Supreme Court invalidated Ohio election laws that effectively excluded all minor parties from the ballot. The Court applied strict scrutiny, holding that the election laws violated both the fundamental right of association and the fundamental right to vote. The Court, however, did little to explain the scope of the rights violated and why some restrictions on ballot access might be subject to strict scrutiny while others might not.

The Supreme Court's next ballot access case did little to clear up this confusion. In *Jenness v. Fortson*, 403 U.S. 431 (1971) , the Court refused to apply strict scrutiny to Georgia's less restrictive petition requirements and filing fees, but failed to explain what distinguished the Georgia restrictions from those invalidated in *Williams.*

scrutiny, and that also fails to apply any requirement of least restrictive means. *See. e.g.. Clements v. Fashing; Munro.* Finally, Justice Stevens, has applied a form of heightened rational basis review which requires a court to balance the right asserted against the harshness of the restriction. *Anderson v. Celebrezze,* 460 U.S. 780 (1983).

Thus, the Court has successfully distinguished sensible restrictions on access to the ballot from those that are egregiously discriminatory, but they have done so by applying varying standards. The Supreme Court has upheld a law which requires officials to resign from office before running for any other office, *Clements,* 457 U.S. at 957 (applying an ad hoc approach), and reasonable petition requirements, *Munro v. Socialist Workers Party* (ad hoc); *Storer v. Brown* (strict scrutiny, compelling state interest found); *American Party v. White* (strict scrutiny, compelling state interest found), but has invalidated highly restrictive petition requirements which disadvantage small parties, *Williams v. Rhodes* (strict scrutiny); *Anderson v. Celebrezze* (heightened rational basis review), and filing fee requirements which provide no alternative procedures for indigents, because such requirements exclude poor people from the ballot. *Lubin v. Panish,* 415 U.S. 709 (1974) (strict scrutiny); *Bullock v. Carter,* 405 U.S. at 134 (strict scrutiny). As Professor Tribe pointed out some years ago, the doctrinal sum of these cases is that severe restrictions on ballot access will be upheld, while minimal restrictions will not. He stated, while from the viewpoint of political theory this result may be tolerable, as a pronouncement of doctrine under the equal protection clause, it is positively delphic. Tribe, *American Constitutional Law* 782 (1978).

Justice Stevens has, perhaps, come closest both to describing the Supreme Court's actual approach, and to finding a method for reconciling the right to vote with the

states' interest in orderly elections and job qualifications. In *Anderson v. Celebrezze,* he applied a form of heightened rational basis review, saying that a State's important regulatory interests [have generally been held] sufficient to justify reasonable, non-discriminatory restrictions. *Id.* at 788. Rather than establishing a standard, the Court articulated a framework for analyzing ballot access restrictions, stating:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. in passing judgment, the Court must not only determine the legitimacy and strength of each of these interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconsitutional. . . . The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made. [*Storer*, 415 U.S. at 730].
>
> 460 U.S. at 788-89.

3. The Standard in This Circuit

In this circuit we have long applied a case by case

method of analysis similar to that now required by *Anderson,* and have developed principles for'determining what restrictions are reasonable. In *Morial v. Judiciary Commission of Louisiana,* 565 F.2d 295 (5th Cir. 1977) (en banc), *cert. denied,* 435 U.S. 1013 (1978) we examined a Louisiana law which required judges to resign before running for any other political office. We stated that

> the requisite closeness of the means-end relations must be determined on a case-by-case basis. The standard to be applied in any case is a function of the severity of impairment of first amendment interests. As the burden comes closer to impairing core first amendment values. . . or impairs some given first amendment value more substantially, . . . the requisite closeness of fit of means and end increases accordingly.

Id.. at 300. In *Morial,* we recognized that the first amendment protects the marketplace of ideas, and that such protection extends not just to the right to speak, but to the right to elect representatives sympathetic to a given group or viewpoint. we therefore held that ballot access restrictions are invalid if their effect is to exclude candidates of an identifiable group or viewpoint. *Id.* at 302. Applying this standard, we upheld the Louisiana law because, though it affected the rights of certain candidates, it had no impact whatsoever on the rights of any particular group of voters.

Similarly, in *Plante v. Gonzalez,* 575 F.2d 1119 (5th Cir. 1978), we stated that ballot access restrictions are not unconstitutional unless 'they are so restrictive that they deny a cognizable group a meaningful right to representation. *Id.* at 1126 (5th Cir. 1978) (quoting Tribe, *American Constitutional Law,* §13-19 (1978). There we examined whether Florida's sunshine law constituted an

unconstitutional restriction. The law required all candidates for office to submit financial disclosure statements as a precondition to candidacy. We held that although such a requirement might place a greater burden on wealthy candidates, it did not exclude them from office. It constituted only a deterrent by way of inconvenience, not a bar to political participation.

4. Application of This Circuit's Law

Thus, this circuit uses a two part analysis. First a group must be cognizable, or identifiable, and second, it must be excluded from meaningful representation. In Plante it was not necessary to reach whether the rich are a cognizable group, because the statute did not create a complete bar to access. In Morial, though incumbent judges were excluded from running for other offices, this did not affect the rights of any identifiable group of voters.[10]

The logic of the Supreme Court's ballot access cases, as applied in this circuit, would require us to examine whether the effect of Art. V, §1-A is a complete bar to candidacy, not merely an inconvenience. Unlike the provision in *Morial,* Art. V, §1-A acts to the disadvantage of a distinct group of voters. Though the aged are not a suspect class, there is no doubt that they are a cognizable group of voters. Age, like gender, is a classification which cuts across all socio-economic, ethnic and racial lines. However, the aged are a group with political interests that are distinct from those of the young. Social Security, health care, pension law, and age discrimination are all issues in which the elderly have a particular interest.

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[10] In *Trafelet v. Thompson*, 594 F.2d at 623, the Seventh Circuit read the cases of our circuit somewhat differently, but the court there failed to appreciate the particular impact of mandatory judicial retirement on elderly voters.

Of course, Mr. Hatten is running for judge. Judges, even if elected do not serve a primarily representative function. Yet no one can deny that the presence in the modern judiciary of judges of different races and backgrounds has improved the quality of justice in Courts of the United States.

The logic of Plante and morial suggests that in this circuit, a per se rule excluding the aged from political office would be constitutionally unreasonable under the fourteenth amendment.[11]

---

[11] A state is clearly vested with the power to prescribe reasonable citizenship, [minimum) age, and residency requirements on the availability of the ballot. . . and the power to prescribe reasonable qualifications extends to candidates for office. *Henderson v. Fort Worth Indedendent School Dist.,* 526 F.2d 286, 292 (5th Cir. 1976) . However, in determining what restrictions are reasonable we are controlled by the specific guarantees of the first and fourteenth amendments. A conclusive presumption that old judges are incompetent denies the aged the right to political association. There is, however, no doubt that a state could constitutionally adopt a procedure for removing judges as a result of senility or incompetence, that focused on the judge's ability to do his or her job.

III. Conclusion

Though swayed by Judge Hatten's argument, we are bound by Diamond and Maresca. Even though neither case addressed the arguments discussed above, a summary dismissal is a decision on the merits, binding on the lower courts. *Hicks v. Miranda,* 422 U.S. 332, 344 (1959). Unfortunately, Judge Hatten's only redress lies with the Supreme Court. The judgment of the district court must be AFFIRMED.

GARWOOD, Circuit Judge, with whom JOLLY, circuit Judge, joins specially concurring:

I concur in the result and in all of Judge Goldberg's eloquent opinion save part IIB and so much thereof as implies criticism of the challenged provision of the Texas Constitution. Any age requirement for an office or position is necessarily arbitrary and will inevitably exclude some number of those who are more qualified than some not so excluded, of which, as applied here, Judge Goldberg would be anyone's Exhibit A. But this does not mean that such requirements are unreasonable: the generality of legislative or constitutional provisions is the norm; and the United States Constitution contains numerous age requirements. Neither such provisions nor those here challenged are intended to deprive of representation that portion of the population not meeting their requirements; they are rather intended to enhance the average of the abilities of the officeholders in question, and are rationally related to that goal. Age is not a suspect or quasi-suspect classification, and in my view is not comparable to race or gender or economic status. That Texas judges are elected rather than chosen in some other manner should not be decisive on the issue of required qualifications. As Judge Goldberg says, judges are not representatives. Judge Hatten has had, as others have had and will have, ample opportunity to serve his state in a judicial capacity, and he has availed himself of it, to his credit and the benefit of his state. But, like any other citizen of Texas, he is properly subject to Article V §1-A of the Texas Constitution, which the people of Texas adopted in 1965.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM M. HATTEN
Plaintiff

V.

CIVIL ACTION
NO. H-87-3444

JACK M. RAINS,
Secretary of State
for the State of Texas,
et al.,

Defendants,

FINAL JUDMENT

For the reasons stated on the record at a hearing held on December 21, 1987, Defendants Jack M. Rains and Williams Clements' motion for summary judgment is GRANTED. Plaintiff's motion for a preliminary injunction is DENIED.

Done at Houston, Texas this *21st* day of *December,* 1987

NORMAN W. BLACK
UNITED STATES
DISTRICT JUDGE.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION *

WILLIAM M. HATTEN

V.

JACK M. RAINS,
Secretary of State
for the State of Texas

CA-H-87-3444
Houston, Texas
December 21, 1987
9:30 a.m.

BEFORE THE HONORABLE NORMAN BLACK
UNITED STATES DISTRICT COURT

APPEARANCES:

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Proceedings recorded and transcript produced by computer-aided transcription.

* The District Court rendered an oral opinion, and then entered the written order, Appendix 1b, infra. This is the transcription of the oral opinion of the oral opinion of the District Court.

THE COURT: This is a very difficult case for a number of reasons. It is always difficult to decide cases when both sides can present such strong and compelling arguments.

It's especially difficult because I have an emotional involvement, as I suppose anybody who has practiced law as long as I have in this county does.

I think it's interesting that the leading case interpreting the Texas statutory and constitutional scheme for retiring judges is named Ewing Werlein because it was Ewing Werlein and Tom Stovall and Bill Hatten that taught me how to do this judicial process.

And they taught me that you have to decide cases no matter how you feel about the, based upon the law and the facts.

There aren't many facts in dispute, if any. I don't think there's any question but that Judge Hatten is 74 years old and will be 75 in August of 1988; that under the ruling of Mr. Veselka, the Democratic party of this county will not permit him to appear on the ballot, for the sole and only reason that when he reaches age 88, he will no longer be able to hold that office pursuant to the terms of the Texas constitution, section 1-a, that provides the office of every such justice and judge shall become vacant when the incumbent reaches the age of 75 years, or such earlier age not less than 70 years, as the legislature may prescribe.

The legislature has, in its wisdom, prescribed in Section 75.001 of the election code that a retired judge may continue to serve as a visiting judge upon his being approved by the Supreme Court and by the official nown known as something other than the presiding judge of an administrative judicial district.

I'm not sure what all that means, except that as Judge Stovall made clear, he occupies that position and there is no question but that if Judge Hatten were required to resign, he would certainly be able to sit as a visiting judge.

I can't agree with the plaintiff's argument that we can divorce the consideration of the constitutionality of the Texas constitution and statutory scheme from our decision today.

I don't think there is any question but that the circuit courts thgat have addressed this question head on have addressed it on the basis of all of the constitutional arguments that can be made:

For examble, Malmed v. Thornburgh where the Third Circuit decided that the Pennsylvania statute requiring retirement of judges at age 70 was not unconstitutional.

I also note the language out of Clements v. Fashing, where the Supreme Court of the United States said in 1982 on page 963, far from recognizing candidacy asw a fundamental right, we have held that the existence of barriers to a candidate's access to the ballot does not of itself compel close scrutiny.

I don't think it's a real issue that in this particular case there must be close scrutiny because Judge Hatten cannot be a candidate. I think the real issue is whether or not the state constitutional statutory scheme for retirement at age 75 is constitutional.

In that regard, let me note parenthetically that Werlein v. Calvert was argued on behalf of Judge Werlein by Thomas Gibbs Gee of Austin, who is now on our court of appeals for the Fifth Circuit.

The question then in my mind is whether or not the

requirement of retirement at age 75 for judicial officers has a rational basis.

Let me add that the comment is often made that Federal judges are appointed for life, but most people don't realize that Congress has seen fit to make it extremely difficult for Federal judges to continue to serve on an active basis once they reach 65, because once a Federal judge reaches 65, if that judge has 15 years of judicial service, that judge can take senior status, receiving full pay and cutting his work load to what he's willing to do. So there is practically no incentive not to take senior status at 65.

In addition, the chief judge of the district is required by statute to step down as chief judge at age 70.

Reading therefore the analysis offered by Clemens v. Fashing and Vance v. Bradley, where the Supreme Court decided it was perfectly constitutional to require foreign service officials to retire at age 60 because there was a rational basis for it, rationally related to legitimate interests, I think the state has shown several factors based upon the articles by former Justice Garwood and Justice Calvert, that the reason for this statutory scheme being put into effect back in 1965 was I suppose three-fold:

One is it encouraged younger candidates to be able to run for judicial office because those at 75 were compelled to step down.

Second of all, the removal process was so difficult and so embarrassing to remove that judge.

And third of all, I suppose it recognized the natural fact that we all must face, that as we get older, we are less able to do those things that we ~~did when~~ we were younger.

Having just turned 56, I can certify that that is certainly

true. As I told my doctor, everything that still works hurts.

I can't see any way to decide this matter except that every Federal court that has addressed the question, from the Supreme Court through the two circuit courts, hgave ruled that it is not unreasonable to treat judicial officers differently and to require that they retire at an age that is admittedly as arbitrary as any other age limit can be, whether it be 50 for a police officer or 60 for a foreign service office, or 70 for a judge in Pennsylvania, 75 for a judge in Texas.

I regret that this means Judge Hatten cannot run for re-election because I would have voted for him, too, and I would have kept voting for him till he was 100 years old.

But I think the law is clear that there is no way around it. The state constitution and the state statute have a rational basis. They support a rational state purpose. And fortunately they will permit us to continue to receive the service of Judge Hatten as long as he wants to serve.

I will grant the defendant's motion for summary judgment. Thank you very much. You presented this matter very effectively.

We stand in recess.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

I, June Simon, Official Court Reporter, United States District Court, Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the above-styled and numbered cause on 12-21-87; that a transcript of an excerpt of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above and foregoing 6 pages constitute a true and correct transcript thereof.

Given Under My Official Hand, this the 19th day of January, 1988.

June Simon
Official Court Reporter

88-1455

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FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

* * * * * * * * *

NO. 87-6302

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

* * * * * * * * *

WILLIAM M. HATTEN, Petitioner
V.
JACK M. RAINS, Secretary of State
for the State of Texas, Respondent;

LARRY VESELKA, Chairman, Harris County
Democratic Party, Respondent.

* * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

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QUESTION PRESENTED

I. Whether the mandatory retirement provision of the Texas Constitution, by barring persons over 75 years of age from seeking elective office as a state district judge, is violative of Petitioner's First Amendment right of access to the ballot, or of Petitioner's Fourteenth Amendment right of access to the ballot.

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STATEMENT OF THE CASE

The facts underlying this controversy are not in dispute. Respondent Rains agrees with the first four paragraphs of the Statement of the Case as contained in the Petition for Writ of Certiorari. Respondent Rains contests Petitioner's description of the Court of Appeals decision, which was contained in the Statement of the Case, and asserts the following:

The Court of Appeals affirmed the District Court issuance of summary judgment in favor of Respondent. The Court of Appeals noted that it was bound by this Court's decisions in which it summarily affirmed *Diamond v. Cuomo*, 70 N.Y.2d 338, 514 N.E.2d 1356 (1987), *appeal dismissed*, ___ U.S. ___, 108 S.Ct. 2008 (1988), and *Maresca v. Cuomo*, 64 N.Y.2d 242, 475 N.E.2d 95 (1984), *appeal dismissed*, 474 U.S. 802 (1985). Those cases were virtually identical to the case at bar.

REASONS FOR DENYING THE WRIT

1. A State Constitutional provision restricting eligibility for election as a state district judge is valid under U.S. Constitutional considerations.

The Fifth Circuit correctly affirmed the dismissal of Petitioner's action on the ground that mandatory retirement at age 75 for state judges did not violate equal protection as a restriction on ballot access and a burden on the fundamental First Amendment right of association. *Hatten v. Rains*, 859 F.2d 687 (5th Cir. 1988).

In upholding Article V, §1-a of the Texas Constitution, the Fifth Circuit observed that the U.S. Supreme Court had spoken twice to the instant issue "in cases with virtually identical facts": *Diamond v. Cuomo*, 70 N.Y.2d 338 (1987), *appeal dismissed*, ___ U.S. ___, 108 S.Ct. 2008 (1988) and *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984), *appeal dismissed*, 474 U.S. 802 (1985). In *Diamond*, the Supreme Court examined New York laws requiring the retirement of elected but not appointed judges at the age of 70. The *Maresca* case was a previous challenge to the law when it affected both elected and appointed judges. The New York Court of Appeals upheld the law in both cases, and the U.S. Supreme Court dismissed both of the appeals for lack of substantial federal questions. In light of the summary dismissals on the merits of these New York cases, the Fifth Circuit rejected Petitioner's argument that the ballot access restriction in this case impermissibly infringed the First Amendment right of access to the ballot.

Contrary to Petitioner's assertions, the Fifth Circuit did not consider itself barred from considering the claim because of this Court's summary affirmances of *Diamond* and *Maresca* for

lack of a "substantial federal question." The Co of Appeals, rather, correctly noted that it bound by those decisions. "Votes to aff summarily, and to dismiss for want of a substan federal question, it hardly needs comment, votes on the merits." *Hicks* v. *Miranda*, 422 U 332, 349 (1975), *quoting Ohio ex rel. Eaton Price*, 360 U.S. 246 (1959).

In evaluating the present case, the Fi Circuit properly applied rational basis review Art. V., §1-a and evaluated the proffe rationales for the legislative enactment. The Fi Circuit thereby concluded that mandatory retirem at age 75 does not violate the equal protect clause in its application of access to the ball The *Diamond* and *Maresca* cases used the ident constitutional analysis, in finding no denial plaintiffs' rights to equal protection of the l after a determination of the rationality of N York's system for choosing and retiring judges.

The Fifth Circuit's decision that the Te Constitution did not violate Petitioner's F Amendment right of access was also in c agreement with every circuit court deciding suc question. Three circuits reviewing the question whether statutory or state constitutional provisi requiring judges to retire at a certain age vio the First and Fourteenth Amendments have upheld the age restrictions and have held that greater scrutiny than the traditional rational b need be applied. *Malmed* v. *Thornburgh*, 621 F 565, 570 (3rd Cir. 1980) (Fourteenth Amendm Equal Protection and Due Process challenge mandatory retirement at 70 for state judge *Trafelet* v. *Thompson*, 594 F.2d 623, 630-631 Cir. 1979) (Fourteenth Amendment Equal Protec and Due Process challenge to mandatory retirem at 70 of elected state judges); *Rubino* v. *Ghe* 512 F.2d 431, 433 (2nd Cir.) *cert. denied*, U.S. 891, 96 S.Ct. 187 (1975) (First

Fourteenth Amendments challenge to mandatory retirement at 70 for elected state judges).

Petitioner, however, contends that the Court's treatment of ballot access cases supports his assertion that strict scrutiny should be applied to his equal protection claim. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (strict scrutiny applies to statute providing no access to the ballot for independent candidates). However, in *Anderson*, strict scrutiny was applied because the restriction had an impact on a specific class of voters. Petitioner has not demonstrated, nor could he, the Texas Constitutional provision serves to disenfranchise any identifiable class of Texas voters. In assessing the applicable standard of review, this Court has held: "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review ... in approaching candidate restrictions, it is essential to examine in a realistic light the extent and the nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). In *Clements v. Fashing*, the Court provided guidance in analyzing this problem:

> Far from recognizing candidacy as a "fundamental right," we have held that the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock v. Carter*, 405 U.S. 134, 43. "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.* ...Our ballot access cases ... do focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process.

> The inquiry is whether the challenged restrictions unfairly or unnecessarily burden the "availability of political opportunity." *Lubin v. Panish*, 415 U.S. 709, 716 (1979)

Clements, 457 U.S. 957, 963-66.

Not all ballot access restrictions have requi "heightened" equal protection scrutiny. *Id.* far, the Court has departed from the rational ba review in only two lines of ballot access cas restrictions using classifications based on wea and restrictions involving classification schemes t impose burdens on new or small political parties independent candidates. *Id.*

Under the test balancing the character of asserted injury to voters' right with the intere advanced by the state, it is necessary to rev the challenged classification based on age a identify the injury it causes to Petition Petitioner has no fundamental right to run elective office. *Bullock*, 405 U.S. at 142-143. is there some fundamental right to vote for elderly. *Rubino v. Ghezzi*, 512 F.2d at 433. injury, if any, can only be to the voters' right vote for Petitioner. The First Amendment does reach this far. A voter is not guaranteed the ri to vote for a specific individual under the Fi Amendment. The First Amendment protects right of association in support of certain polit views and access to the ballot only to the ext that a citizen may vote for a candidate profess those views. *Anderson*, 460 U.S. at 793. "availability of political opportunity" is theref not lacking here. The Texas Constitution does obstruct the voters' freedom to support and cho their party's candidate.

Inasmuch as age is not a suspect classificati and there is no appreciable impact on an identifia class of voters, the proper level of inquiry to

applied in cases involving mandatory judicial retirement restrictions is whether the state had a rational basis for the restriction. Although age requirements for an office will inevitably exclude some number of qualified candidates, this does not mean such restrictions are unreasonable. Indeed, the United States Constitution contains numerous age requirements. These requirements, as well as those of the Texas Constitution, are not intended to deprive of representation that portion of the population not meeting their requirements; they are intended to enhance the average of the abilities of the officeholders in question. *See Hatten v. Rains*, 854 F.2d at 696 (concurring opinion of Judge Garwood.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 18th day of May, 1989, to:

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